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2 UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF NEW YORK

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5 NICHOLE MARIE MCDANIEL, ET AL.

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9 Plaintiff,

10 -versus-

04-CV-757

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(FINAL FAIRNESS HEARING)

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13 THE COUNTY OF SCHENECTADY

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Defendant.

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19 TRANSCRIPT OF PROCEEDINGS held in and for
20 the United States District Court, Northern District of
21 New York, at the James T. Foley United States Courthouse,
22 445 Broadway, Albany, New York 12207, on WEDNESDAY,
23 SEPTEMBER 5, 2007, before the HON. GARY L. SHARPE,
24 United States District Court Judge.

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2 APPEARANCES:

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4 FOR THE PLAINTIFFS:

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6 LAW OFFICE OF ELMER R. KEACH

7 BY: ELMER R. KEACH, III, ESQ.

8 - and -

9 BERANBAUM, MENKEN LAW FIRM

10 BY: BRUCE E. MENKEN, ESQ.

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14 FOR THE DEFENDANT:

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16 GOLDBERG, SEGALLA LAW FIRM

17 BY: WILLIAM J. GREAGAN, ESQ.

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1 (Court commenced at 3:00 PM.)

2 THE CLERK: The date is Wednesday, September 5,
3 2007, at 3:03 PM. In the matter of Nichole Marie McDaniel, et
4 al. versus the County of Schenectady et al, Case Number
5 2004-CV-757. We're here for a final fairness hearing. Can we
6 have appearances for the record, please.

7 MR. MENKEN: Bruce Menken, Beranbaum, Menken,
8 80 Pine Street, New York, New York, for the plaintiffs and
9 class. Good afternoon, your Honor. And thank you very much
10 for your patience and I apologize for the delay.

11 THE COURT: All right. Thank you. Good
12 afternoon.

13 MR. KEACH: Robert Elmer Keach, III, law
14 offices of Robert Elmer Keach, PC, 1040 River Front Center,
15 Amsterdam, New York 12010, and your Honor, this is my
16 paralegal Heather Decker. Good afternoon, your Honor.

17 THE COURT: Good afternoon.

18 MR. GREAGAN: William J. Greagan, for the
19 defendants, Goldberg, Segalla, 7 South Woods Boulevard,
20 Albany, New York 12211.

21 THE COURT: Good afternoon.

22 MR. GREAGAN: Good afternoon, your Honor.

23 THE COURT: All right. Let's take up the
24 proposed order that was submitted to me that allows for the
25 filing of late claims. Is there anything to add to the

1 request on the part of the class or any responses that the
2 defendants care to make to that proposed order?

3 MR. KEACH: Your Honor, there is a lady by the
4 name of Laura Lichenstein (phonetic) who contacted me, and
5 then also contacted Mr. Greagan, she's a class member; she
6 contacted me this morning and provided me with a late claim;
7 and she is a member of the class. So that would be one more
8 person in addition to those that are reflected on that Order.
9 If your Honor would like, I can very quickly submit another
10 proposed order that reflects Miss Lichenstein's participation
11 in the class if your Honor is amenable to allow me all the
12 details in the order.

13 THE COURT: So instead of 33, it would become
14 34 with her?

15 MR. KEACH: Yes, sir.

16 THE COURT: All right. Any objections to that
17 on the part of the defendant?

18 MR. GREAGAN: No, your Honor.

19 THE COURT: John, is that going to need to be
20 filed in the e-mailbox?

21 THE CLERK: If they wanted to provide it to the
22 e-mailbox, they could.

23 THE COURT: I will issue the order, so please
24 submit it. At the conclusion of the proceedings today, you
25 can get the e-mail address from John and he'll give you the

1 address where to e-mail the order.

2 MR. KEACH: Okay. In PDF version or...

3 THE COURT: Well, that's the whole point.

4 THE CLERK: It should be Word Perfect.

5 THE COURT: You got Word?

6 MR. KEACH: I don't have Microsoft Word.

7 THE COURT: John, does that convert?

8 THE CLERK: I think I can convert it. That
9 will be fine.

10 THE COURT: All right. Educate me. What's the
11 ECM notification order -- let's not worry about this case --
12 what, in general, does it require?

13 THE CLERK: It requires that the document be
14 submitted in Word Perfect format. Just for the simple point
15 of converting it from Word Perfect to PDF. But if it is in
16 Word, Word can be converted to Word Perfect, which Word
17 Perfect can then be converted to PDF.

18 THE COURT: So it's okay then for him to submit
19 it to the mailbox?

20 THE CLERK: Correct.

21 THE COURT: Okay. What we're talking about,
22 just to send education out to the community, is there's a
23 requirement in one of the local rules, it's in that either
24 standing order or local rule dealing with electronic
25 notification and filing of documents by the parties, that when

1 you submit a proposed order, you submit it to this mailbox
2 location that's included in the order. And the function of
3 that is, it's common when the Court gets a proposed order that
4 it might make an alteration or two to the proposal to whoever
5 is proposing it, and in order to do that, we've got to be able
6 to convert it over to a document where we can go in, make the
7 alterations we want and execute the order in its final format.
8 That's the function of the entire process. And the Court is
9 working its way through those requirements just as all the
10 parties and litigants and lawyers in town are working their
11 way through it as well. But for the record, it's my intention
12 to issue the order with the amendment as is proposed and
13 permit the additional late filing. And if counsel would
14 submit a proposed order to me, I'll go ahead and execute it
15 when I receive it. All right.

16 MR. KEACH: Thank you, your Honor.

17 THE COURT: All right. We're here, in essence,
18 to consider the settlement that's been reached by the parties.
19 And from an overall perspective, the Court must determine that
20 the class action settlement is fair, adequate and reasonable
21 and not a product of collusion. So that's the overall issue
22 before the Court. I'm citing there D'Amato, which is 236 F.3d
23 78 at 85, Second Circuit's 2001 decision.

24 I have reviewed all of the papers that have
25 been submitted by the parties in connection with the purpose

1 for which we're here. Let me take up two collateral issues
2 that impact on the primary issue, and that is, what's left in
3 the class pool. There are two issues in that regard that have
4 an impact on what's left in the class pool. One is the
5 incentive awards. The other is the attorneys' fees. Because
6 as I read the proposed settlement of the parties, the
7 settlement is \$2.5 million. So the question is, in essence,
8 what goes to the lawyers out of that 2.5, what goes to the two
9 individuals by way of incentive awards. And when I talk about
10 the lawyers, I'm also throwing into that hopper the costs and
11 disbursements and those things. But let me first take up the
12 incentive awards.

13 In this case, it's claimed that Lessie Davies,
14 while living in a homeless shelter, kept in touch with
15 counsel, appeared as scheduled to be deposed by the
16 defendants, and that without her efforts, this action may well
17 have had a different impact. It is further claimed that
18 William Smith agreed to serve as class representative in 2005
19 and provided class counsel with assistance in locating and
20 speaking to the members of the class. His intervention was
21 eventually unnecessary because of the parties' effort to
22 resolve the action. Generally speaking, when a person joins
23 in bringing an action as a class action, he's disclaimed any
24 right to a preferred position in the settlement. An incentive
25 award may be appropriate, if necessary, to induce an

1 individual to participate in the suit. There are really no
2 allegations that Miss Davies needed to be induced to
3 participate in the suit. Other relevant factors include the
4 actions the plaintiff has taken to protect the interests of
5 the class, the degree to which the class has benefited from
6 those actions, and the amount of time and effort the plaintiff
7 expended in pursuing the litigation. In appropriate
8 circumstances, the class representative can get an incentive
9 award for the risks they take in their vanguard role in the
10 litigation.

11 In this case, I have no difficulty, given the
12 overall standard of my approval authority, in approving an
13 incentive award for Lessie Davies in the amount of \$12,000 as
14 for the proposed intervenor; the other individual, \$1,500. So
15 I approve those components of the settlement.

16 Let me turn to the issue of attorneys' fees. I
17 do not approve of the proposal that's been submitted to me,
18 though it's been submitted to me in alternatives. Let me give
19 you the benefit of my ruling and tell you how I see it.

20 Class counsel has applied for \$650,000 in
21 attorneys' fees and expenses. This represents approximately
22 26 percent of the 2.5 million common funds of the settlement.
23 Comparing this to the lodestar amount, this would amount to
24 between 1.98 to 2.24 times counsels' ordinary hourly fees
25 which they calculate to be approximately \$344,795 or 756.

1 This amount is what class counsel would regularly charge in
2 their home jurisdiction. This amount is based on each
3 attorneys' ordinary billing rates, not the prevailing market
4 rates used in the Northern District of New York when awarding
5 attorneys' fees in civil rights cases under 42 USC 1988. The
6 amount they would get if they were from the Northern District
7 of New York is \$285,412.

8 What constitutes a reasonable fee is properly
9 committed to the sound discretion of the District Court.
10 That's *Goldberger*, 209 F.3d 43, Second Circuit 2000.
11 Moreover, the Court is to act as a fiduciary who must serve as
12 a guardian of the rights of absent class members. Thus, the
13 Court must approach fee awards with an eye to moderation. In
14 the past, both the lodestar and the percentage of fund methods
15 have been available to district judges in calculating
16 attorneys' fees in common fund cases. Let me point out that
17 the lodestar, which now has a new name under which the
18 district court scrutinizes the fee petition to ascertain the
19 number of hours reasonably billed to the class and then
20 multiplies that figure by an appropriate hourly rate, once
21 that initial computation has been made, the district court
22 may, in its discretion, increase the lodestar by applying a
23 multiplier based on other less objective factors such as the
24 risk of litigation and the performance of the attorneys. The
25 second method is simpler. The Court sets some percentage of

1 the recovery as the fee in determining what percentage to
2 award, the courts have looked to the same less objective
3 factors that are used to determine the multiplier for the
4 lodestar.

5 Of course, no matter which method is chosen,
6 the Court should continue to be guided by the traditional
7 criteria in determining a reasonable common fund fee,
8 including the time and labor expended by counsel, the
9 magnitude and complexities of the litigation, the risk of the
10 litigation; the quality of representation, the requested fee
11 in relation to the settlement, and public policy
12 considerations. However, the Second Circuit has recently
13 noted that the meaning of the term "lodestar" has shifted over
14 time and its value as a metaphor has deteriorated to the point
15 of unhelpfulness. That's *Arbor Hill*, which may be found at
16 2007 Westlaw 204106, July 12, 2007, Second Circuit.

17 Concerning the lodestar method, the Court noted
18 that the Court abandoned its use. The better course than the
19 one most consistent with attorneys' fees jurisprudence is for
20 the district court, in exercising its considerable discretion,
21 to bear in mind all of the case specific variables that this
22 court and other courts have identified as relevant to the
23 reasonableness of attorneys' fees in setting a reasonable
24 hourly rate. Accordingly, the reasonable hourly rate is the
25 rate a paying client would be willing to pay.

1 In determining what rate a paying client would
2 be willing to pay, the district court should consider, among
3 others, the Johnson factors. It should also bear in mind that
4 a reasonable paying client wishes to spend the minimum
5 necessary to litigate the case effectively. The district
6 court should also consider the section individual might be
7 able to negotiate with his or her attorneys, using their
8 desire to obtain the reputational benefits that might accrue
9 from being associated with the case. The district court
10 should then use that reasonable hourly rate to calculate what
11 can properly be termed the presumptively reasonable rate.

12 In that regard, the Johnson factors refer to
13 Johnson versus Georgia Highway Express, 488 F.2d 714, Fifth
14 Circuit, 1974. The Johnson factors are 12 in number: The
15 time and labor required; the novelty and difficulty of
16 questions; the level of skill required to perform the legal
17 service properly; the preclusion of employment by the attorney
18 due to acceptance of the case; the attorney's customary hourly
19 rate; whether the fee is fixed or contingent; the time
20 limitations imposed by the client or the circumstances; the
21 amount involved in the case and the results obtained; the
22 experience, reputation and ability of the attorneys; the
23 undesirability of the case; the nature and length of the
24 professional relationship with the client; and awards in
25 similar cases.

1 Having said that, mind you, the Circuit says in
2 Arbor Hill that we've now simplified the process of now
3 ascertaining attorneys' fees. I guess the test of time will
4 demonstrate whether that's so or not. What the Circuit has
5 recently restated is that in calculating the presumptively
6 reasonable fee, the analysis involves determining the
7 reasonable hourly rate for each attorney and the reasonable
8 number of hours expended and multiplying the two figures
9 together to obtain the presumptively reasonable fee award.
10 That's Porzig, P-O-R-Z-I-G, 2007 Westlaw, 2241592. That's an
11 August 7, 2007 Second Circuit decision.

12 It noted that courts are regularly called upon
13 to conduct a reasonable fee analysis even though a lawyer may
14 have taken the case on a contingent fee. Considering the
15 factors I've outlined, the Court believes that the percentage
16 method is unreasonable. Instead, the Court elects to
17 determine what amount is reasonable using the factors
18 articulated in Goldberger and the most recent Arbor Hill
19 decision.

20 Among the factors to consider is the time and
21 labor expended, the first Goldberger factor. This factor is
22 satisfied. It does appear that class counsel put substantial
23 time and effort into this case, including investigating it,
24 prosecuting it, conducting discovery, and engaging in
25 settlement negotiations, responding to inquiries of potential

1 class members, as examples. This Court can conclude that the
2 time and effort is adequately compensated by allowing the
3 attorneys their ordinary and customary hourly rates for the
4 hours expended. Moreover, while multipliers may be
5 appropriate in some instances, it's not appropriate in this
6 case. Class counsel has had at least two other similar cases
7 in this district such that some of the ground work for this
8 litigation was already established. If the Court were to
9 allow the substantial attorney fee award of 26 percent or
10 apply a multiplier to the reasonable amount, this would not be
11 fair or reasonable for a fee paying client. As previously
12 discussed, the case is not particularly complex. It's an
13 ordinary civil rights case in which liability appears
14 reasonably certain. Thus, the second Goldberger factor,
15 complexities of the litigation, is low but does not
16 necessarily defeat the reasonableness of attorneys' fees.

17 The third Goldberger factor is to consider the
18 risk. All cases have inherent risk. As noted, however,
19 liability was reasonably certain. Indeed, there was risk on
20 the issue of damages, however. The damages risk is of little
21 consequence to an attorney for a prevailing plaintiff in a
22 civil rights case who's entitled to obtain attorneys' fees
23 pursuant to 42 USC 1988. Thus, even if class counsel was
24 successful after a trial and a jury awarded some nominal
25 amount, the attorneys would be entitled to a reasonable hourly

1 rate subject to any modification based upon the result
2 achieved and other pertinent factors. If a jury awarded a
3 significant fee absent evidence of any other fee agreement
4 between plaintiffs and counsel, counsel would still be limited
5 to the reasonable hourly rate subject to certain reasonable
6 modifications. Of course, there's a risk of losing the case
7 and recovering no fees, but this is a risk every lawyer takes
8 in handling matters on a contingency basis.

9 As to the fourth Goldberger factor, the quality
10 of representation, the Court believes the class counsel did a
11 fine job and obtained a good settlement. However, counsel are
12 adequately compensated for their services by using the
13 reasonable hourly rate for services actually performed.

14 As to the fifth factor, the requested fee in
15 relation to the settlement is unreasonable. Through the
16 percentage method, counsel seeks roughly 26 percent of the
17 common fund, including multipliers. However, without any
18 modifications, the actual weight for work performed,
19 compensating counsel for that work as billed from their
20 area -- in other words, not applying the traditional lodestar
21 method -- constitutes approximately 13 percent of the common
22 fund. This percentage, 13 percent, is squarely within the
23 range of reasonable percentages in such a case, as is
24 demonstrated by Goldberger itself.

25 The final Goldberger consideration is that of

1 public policy. The Court in Goldberger provided numerous
2 compelling public policy reasons for keeping an eye on
3 attorneys' fees in class action cases. Arbor Hill, the
4 additional factors the Court must consider are the preclusion
5 of employment by the attorney due to acceptance of the case.
6 The Court notes Mr. Keach's mention that his resources were
7 stretched to the limit in this case. Counsel's normal rate,
8 the settlement agreement which states that the rate will not
9 exceed 26 percent, the amount involved in the case, the
10 result, the undesirability of the case, the nature and length
11 of the professional relationship with the client, and the
12 awards in similar cases, taking all of these factors into
13 consideration, the Court must ascertain what fee is
14 reasonable.

15 Based on the discussion I've just provided, I
16 decline to use the percentage method or any type of
17 enhancement to award the attorneys more money than time
18 actually worked. Having reviewed the time records submitted
19 in connection with this motion and in lieu of the Arbor Hill
20 decision, the Court declines to adjust the hourly rates
21 despite the time sheets submitted to the Court which include
22 hourly rates up to \$450 which are higher than those charged in
23 the Northern District of New York. What I'm saying by that
24 is, I'm not adjusting the rates down by virtue of the old
25 jurisprudence in the lodestar; I'm leaving the rates as billed

1 by the lawyers as reflected by their hourly billing rates.

2 Based on the foregoing, the Court allows
3 attorneys' fees in the amount of \$344,795 and includes monies
4 for future work to be performed. The Court further allows
5 unreimbursement litigation expenses in the amount of
6 \$9,001.50; I believe that's the amount that's been submitted;
7 and \$107,000 in administrative expenses. This totals
8 \$460,796.50.

9 That leads me back then, having ascertained
10 those, to the impact of that decision on the overall
11 settlement for the class. So then I review, for purposes of
12 the ultimate decision, what I've already said; is that the
13 class action settlement is fair, adequate and reasonable, and
14 not a product of collusion.

15 Persons wishing to be heard on these issues
16 were required to file a notice of appearance. One notice was
17 filed by Keith Harris. His letter did not reflect a basis for
18 the objection, only that he objected and intended to appear.
19 However, he's presently incarcerated in Five Points
20 Correctional Facility on robbery charges and is not eligible
21 for parole until next year. The Court has heard from class
22 counsel and defense counsel.

23 Looking at the procedural and substantive
24 fairness of the case, the Court looks to the history of the
25 case with which the Court is familiar, and it's evident that

1 the proposed settlement was the product of hard-fought,
2 arms-length negotiations between experienced class counsel and
3 experienced defense counsel and that settlement was achieved
4 only after significant discovery had taken place. The
5 settlement process was lengthy. The Court appreciates the
6 invaluable assistance that Judge Treece provided in that
7 process but recognizes, ultimately, it was the parties who
8 resolved the issues themselves. Nonetheless, the Court finds
9 the settlement to be procedurally fair. With respect to the
10 substantive fairness of the settlement, the Court has already
11 articulated the various factors that apply to that substantive
12 analysis, and the Court observes as follows about those
13 factors:

14 As to the first factor: The complexity,
15 expense and likely duration of the litigation; that factor is
16 somewhat neutral and possibly tilts in favor of finding
17 substantive fairness. The underlying legal claims are not
18 complex. However, given the nature of those claims, including
19 the probability of any substantial recoveries, the cost of
20 prosecuting this case in light of the likely low recoveries,
21 the discovery needed to substantiate the claims and any
22 damages, this factor more favors approval of the settlement
23 than not.

24 As for the second factor, the reaction of the
25 class, this weighs in favor of approval. There's only been

1 one objection to the proposed settlement, two have chosen to
2 opt out of the settlement, and over 875 people who submitted
3 claims, and there are additional late claims that the Court
4 has ordered accepted, it appears that the classes' reaction to
5 the proposed settlement has been positive.

6 As to the stage of the proceedings and the
7 amount of discovery completed, the third factor, this weighs
8 in favor of approving the settlement. It's evident in this
9 case there's been extensive investigation of the factors
10 underlying the claims in the complaint and substantial
11 discovery. There have been numerous depositions and
12 significant exchange of documents.

13 As to the fourth factor, the risks of
14 liability, class counsel concedes and the Court agrees that
15 risk establishing liability does not favor final approval of
16 the settlement. From the Court's perspective, the issue of
17 liability does not appear to be complex. Specifically,
18 liability issues were significantly impacted by the decision
19 in *Marriott*, at 227 Federal Rules Decision 159, Northern
20 District of New York, 2005, Judge Hurd's decision.

21 The risks of establishing damages, the fifth
22 factor, weighs strongly in favor of approval. There are
23 numerous issues in the case such as this one that makes the
24 issue of damages subject to significant question. Proving
25 more than nominal damages in this type of case is no easy

1 task. It may require proof of physical or emotional harm,
2 which, again, is difficult to prove. Moreover, one never
3 knows how a jury is likely to reward such injuries, if at all,
4 particularly when the class of plaintiffs which consist of
5 persons who tend to have run-ins with the law may not be
6 viewed with much sympathy.

7 The sixth factor, risk of maintaining the class
8 action through trial, has little bearing on the approval of
9 the settlement and, if anything, weighs against it. The Court
10 finds that there are few risks that maintaining a class action
11 through trial particularly because the Court certified the
12 class.

13 The seventh factor, the ability of the
14 defendants to withstand greater judgment is somewhat
15 neutral. It appears that the settlement has largely exhausted
16 the county insurance policy limits, but they've agreed to pay
17 some public money into the settlement fund. However, further
18 award would likely cause detriment to its citizens.

19 The eighth and ninth factors, the range of
20 reasonableness of the settlement funds in light of the best
21 possible recovery and litigation risks is somewhat difficult
22 to gauge. These types of cases are difficult to predict. A
23 plaintiff may hit the lottery, so to speak, or can be awarded
24 nominal damages. As noted, damages would be difficult to
25 prove. Thus, on balance, the Court finds that these factors

1 weigh in favor of approval of settlement, although only
2 slightly.

3 Taking all of those factors into account, the
4 Court is satisfied that the proposed settlement is
5 substantively fair, in particular, given the Court's
6 modification on the attorney fee issue.

7 So for all of those reasons, the Court finds,
8 consistent with its findings relative to the various
9 components of the settlement, the settlement is substantively
10 and procedurally fair and in the best interests of the
11 members.

12 What, if anything, do the plaintiffs care to
13 share with me about the decision I've rendered?

14 MR. MENKEN: Your Honor, needless to say, we're
15 disappointed with the Court's ruling on attorneys' fees; quite
16 satisfied, glad of the Court's ruling granting final approval
17 on what was a hard-fought case and what we, without a doubt,
18 as indicated in our papers, believe was a great settlement.
19 And it was done quickly and efficiently. In fact, this case
20 was completed from beginning to end in much shorter fashion
21 than the Marriott case that your Honor cited. And, in fact,
22 what has happened by your Honor's ruling, is that there is now
23 going to be a dis-incentive to settle cases in a quick and
24 efficient way because of the Court's refusal to follow the
25 percentage of fund method and attorneys' fees.

1 In assessing attorneys' fees, and as far as I
2 can tell, the Court has relied on, at least partially, in its
3 rejection and reduction in counsels' application for
4 attorneys' fees on Arbor Hill. And I don't think that the
5 Court could -- Arbor Hill and this case are apples and
6 oranges. Arbor Hill was not a class action case. Arbor Hill
7 was a case where counsel for the prevailing party did not take
8 the amount of risk that counsel here took because they, as far
9 as we understand, were paid something for their work.

10 In addition, I think that Marriott and the
11 Neilsen (phonetic) case, which is that Maine case, are
12 completely on all fours with this decision -- with this case.
13 And if, in fact, the Court were to use Arbor Hill as a
14 barometer in setting a reasonable attorney's fee, I think that
15 the Neilsen case, in conjunction with the Arbor Hill case
16 suggests that in ascertaining what a customer would pay for a
17 class action civil rights lawyer in the Capital District area,
18 it would have to, as Judge Hornby did in the District of
19 Maine, use the conventional personal injury model, where the
20 one third number was something that was more in line and what,
21 in fact, Judge Hornby used in the District of Maine to grant
22 counsel the 25 percent.

23 We have in our settlement agreement preserved
24 our right to appeal on this issue and we will review your
25 Honor's record that was made and we'll consider our options,

1 and I respectfully object. And Mr. Keach may want to mention
2 something about the Goldberger factors.

3 MR. KEACH: Id your Honor begrudge me the right
4 to make an additional record.

5 THE COURT: No, please do.

6 MR. KEACH: Okay. I think the Court -- one of
7 the points the Court made when it addressed the Goldberger
8 factors was the risk involved and the Court's perception that
9 counsel did not bear risks at the time they filed this case.
10 At the time this case was filed, the decision that your Honor
11 references as addressing the risk, the Marriott case, had not
12 come down. Had Judge Hurd ruled the other way in Marriott,
13 and I'm not sure the Judge's name, but a decision in the
14 Southern District, Steinberger versus County of Rockland, oh,
15 it's Judge Bryant, ruled, in fact, the changeout that was the
16 discussion -- or was the -- was one of the contested issues in
17 this case is, in fact, constitutional, had Judge Hurd ruled as
18 Judge Bryant did and/or had the Second Circuit reversed Judge
19 Hurd, I think the Court would have a much different perception
20 of the risks we bore at the time that we filed this action.

21 Additionally, and this is not in the papers I
22 filed with the Court, but if the Court -- while certainly the
23 Marriott case has gone relatively well, while the Rensselaer
24 County case, you know, was resolved -- I don't want to say
25 that case went particularly well, but it was resolved, if the

1 Court wants introspect as to the difficulties or a contrast as
2 to the difficulties that are faced in this litigation, I
3 direct the Court to Critcher (phonetic) versus County of Erie,
4 which resulted in re county of Erie, which we lost, which is
5 one of the seminal decisions now being rendered in the -- was
6 a seminal decision of the Second Circuit, in fact in the
7 country, about the privilege that attaches to Government
8 lawyers. And when they provide mixed advice about policy and
9 also, you know, legal matters, and that case has been going on
10 largely for as long as this case has, we have spent probably
11 as much, if not more time than working on this case; as much,
12 if not more time in attorneys' fees; and that case has no hope
13 of resolution for the foreseeable future for a number of
14 different, a number of difference reasons. Certainly, that
15 could have been the result of this litigation. We could
16 have -- we have abled counsel, Mr. Greagan. While Mr. Greagan
17 and I had pretty significant differences in this case, he is
18 a -- and he adversarially came up with a lot of novel ideas
19 about the PLRA and how that could impact on the case, and
20 certainly all of those things could have taken or a ruling
21 contrary to positions we had advanced would have had a
22 dramatic impact on the case and a dramatic impact on our
23 ability to prosecute it and most certainly a dramatic impact
24 on the risk that the Court has assessed here. I believe it is
25 error for the Court to look at the risks today as compared to

1 looking at the risk at the time the case was filed three and a
2 half years ago.

3 I also believe that some of the other
4 Goldberger factors may have been misapplied.

5 And, lastly, I believe that the Second
6 Circuit's most recent pronouncement in the Wal-Mart stores
7 anti-trust case, the Second Circuit -- I believe the
8 multiplier in that case was for a multiplier with an order of
9 magnitude that's far beyond this litigation, far beyond any
10 litigation, frankly, I think, that's ever been litigated, you
11 know, north of Manhattan, you know, approved a multiplier
12 for -- and approved it -- I don't know what the precise
13 attorney fee there was, but I know it was into the hundreds of
14 millions of dollars. And as part of that analysis and part of
15 the other case law, it talks about kind of a reverse sliding
16 scale when it comes to the percentage fees. In a smaller case
17 the percentage method becomes more appropriate and a higher
18 percentage can sometimes be appropriate. We believe the Court
19 has misapplied that as well.

20 Thank you, your Honor, for allowing me making a
21 record.

22 THE COURT: Certainly. Mr. Greagan, do you
23 want to be heard on this issue?

24 MR. GREAGAN: Just very briefly, your Honor.
25 Obviously, the county is in favor of the settlement and

1 supports the settlement of the case and is happy to be
2 resolved in that fashion. The only thing with respect to the
3 public policy uses of the class action method, certainly, this
4 case and the Marriott case and the Rensselaer case and, you
5 know, that's that's three counties in 62, and I think the
6 Court recognizes that there's -- that there should be -- that
7 this should not be a piñata event against each county based
8 upon the Marriott decision, and I think the Court's finding
9 regarding the fees reflects that.

10 By the same token, and as to the risks these
11 parties took in bringing this case, and the Court has reviewed
12 the billing records, these two women, Lessie Davies and
13 Nichole McDaniel, were arrested for the first time,
14 apparently, in their lives on June 11, 2004. Mr. Keach's
15 billing records go back to October 2003, and reflect that he
16 was essentially trolling the Schenectady County Jail for eight
17 months looking for a class representative before these two
18 women were arrested and before the clients in this case ever
19 existed. Mr. Laduca's affidavit contains a billing record
20 dated June 10, the day before they were arrested, in which
21 they were drafting the complaint against the Schenectady
22 County Jail. So to say that there was risk involved in
23 bringing this case and that the client relationship and the
24 risk on behalf of these clients was great is simply not true.
25 This is a case where people go looking for parties so that

1 they can sue the county, armed with prevailing case law and a
2 fundamental change as to the counties to make changeouts
3 illegal. And so every county in the state probably had the
4 same policy and is exposed to the same risk. And so, I just
5 want to make the record that in this case the evidence
6 provided in support of this motion indicates that the
7 plaintiffs' attorneys in this case were looking to sue the
8 county before anybody walked in their door and said I have
9 been wronged.

10 THE COURT: Well, let me just make clear, I'm
11 not going to rehash everything I've said, but I want to make
12 certain that the parties understand what I say. Sometimes I
13 think I was clear, but sometimes the ears aren't -- don't
14 agree with me.

15 What I'm saying about Arbor Hill is this, I'm
16 simply dispensing with the classic definition of the lodestar
17 method. If that were to be applied as the way it was
18 consistently applied, it would be irrelevant where an attorney
19 was from, it would be what the prevailing rate is for
20 attorneys in this area. That's the aspect of Arbor Hill that
21 I'm dispensing with when I say that's no longer the standard
22 of what constitutes a reasonable attorney's fee. That is as
23 substantial an explanation why some of the fees as calculated
24 in the fee schedule submitted by class counsel, they would
25 have exceeded that traditional rate in the Northern District

1 of New York. I've not discounted them as a result of that.

2 That's the impetus of the Arbor Hill decision.

3 The gist is, is in some respects what
4 Mr. Greagan is pointing to. It's not the billing records,
5 when they occurred and that kind of thing, that's not the
6 focus. The focus is, though, what he does point out; that
7 this was an issue that was not novel in this case. It's an
8 issue that's not novel in this state in light of the state of
9 jurisprudence, and this lawsuit was modeled on those which had
10 occurred before. So it is simply my view that to effectuate a
11 multiplier in this case under these circumstances, in light of
12 the history of this kind of litigation in the Northern
13 District of New York is simply unwarranted and serves to the
14 detriment of the class. Nothing changes here other than the
15 amount that goes to the plaintiffs as opposed to the amount
16 that goes to the lawyers. The overall settlement remains the
17 same. And in my view, for the reasons I've articulated, and I
18 appreciate the respectful dissent of class counsel, but in my
19 view, that's what's fair and reasonable to the class here and
20 that honors my obligation to look out for them in the details
21 of the settlement agreement. So I appreciate the parties
22 articulating their positions. And, of course, they will
23 preserve and effectuate whatever rights they have under the
24 terms of the settlement agreement. And I certainly have no
25 intention of throwing water on that. In other words, the

1 parties will do what they believe they ought to do.

2 I would request that class counsel, consistent
3 with my ruling today, submit a proposed order to me to
4 effectuate -- unless, of course, we want to incorporate the
5 record of these proceedings into the Court's judgment. And
6 this constitutes the decision of the Court. What's the
7 parties' preference in that regard?

8 MR. KEACH: I have some -- I just have some
9 questions, because I don't, I don't understand quite what the
10 Court announced as far as I didn't hear some of the amounts.
11 And there's also a provision, your Honor, in the settlement
12 agreement that if there is a, if there is an amount that's in
13 dispute pending an appeal, but there are amounts that are
14 undisputed, there will be a partial distribution to the class.
15 So we'd have to incorporate that into the Court's order as
16 well. Meaning, whatever, obviously, I think we've made clear
17 to the Court our intention.

18 THE COURT: That's why I think the proposed
19 order is the better way to go.

20 MR. KEACH: Okay.

21 THE COURT: Where the parties consult with one
22 another and submit a proposed order to me.

23 MR. KEACH: Just so I'm clear, so we can
24 prepare such a proposed order, I believe the Court said
25 \$344,795 in attorneys' fees.

1 THE COURT: That's in the body of my memo and
2 the summary, is \$344,756. I can tell you what I intend. I
3 intend to approve the fee award sought for the hours billed;
4 that's what I intend to approval. If there's no dispute as to
5 what that specific number is, submit it to me in the proposed
6 order.

7 MR. KEACH: I think the next question I have,
8 your Honor, is, does that preclude -- since the Court has
9 awarded attorneys' fees for hours worked, does that preclude
10 class counsel from being compensated both for their time
11 subsequent to the application for attorneys' fees, which,
12 from -- at least from my standpoint is substantial, as well as
13 the time that is required going forward to administer the
14 settlement and deal with the, I think best term I can use,
15 chaos of having to address the claims of almost 900 people
16 people who move, you know, they can't -- you know, we have to
17 track them down, we have to get them their checks; are we
18 precluded from being compensated from that in the Court's
19 order?

20 THE COURT: You are not. I have to intention
21 of precluding compensation for hours actually worked at the
22 rates billed. Do I presume that what you intended to do was
23 to include that in the multiplier so that the Court's order
24 would, if I had authorized the multiplier you sought, you
25 would have eaten those costs as a part of the multiplier.

1 MR. KEACH: Yes.

2 THE COURT: All right. Then how do we
3 orchestrate what my intention is? To me, that needs to be in
4 the language of a proposed order. In other words, I would
5 want the proposed order to effectuate what I intend. What I
6 intend is what you just indicated. So you're going to have to
7 propose to me what the language of the order is that will
8 effectuate that intent.

9 MR. KEACH: I have an idea of how to do that.
10 I don't know if your Honor wants me to share it now so we can
11 discuss it or put...

12 THE COURT: If you think there's going to be
13 any problem with it, throw it out there.

14 MR. KEACH: Well, I don't ...

15 THE COURT: I don't know what you mean.

16 MR. KEACH: Okay. Obviously, the amount that's
17 set aside for attorneys' fees that goes into an interest
18 bearing account pending appeal, it's -- money is set out of
19 the settlement, and the Second Circuit affirms your Honor's
20 ruling, then a first wave is distributed to the class. As
21 part of the second wave of checks, that amount will be out
22 there any way, and so basically I would put language in the
23 order that would allow us on an interim basis based on
24 reasonable hours worked to apply to the Court for compensation
25 for work going forward, the Court can consider the fee

1 application, and in the event the Court is amenable to that
2 application, those monies can be deducted from the amount held
3 in escrow pending appeal.

4 THE COURT: The only thing I'm not -- I'm
5 sitting here pausing on, because I'm not sure what I feel the
6 answer to that is, is whether or not the class ought to bear
7 the responsibility for the appeal. In other words, I don't
8 know what I feel about saying to you today at this moment that
9 I would authorize expenditure of monies under the appeal
10 authorized by the settlement agreement that would be deducted
11 from the money going to the class. No question that I would
12 authorize any expenditures necessary to administer the monies
13 going to the class. In other words, the costs of doing that.
14 So I have no problem with -- and I'm thinking about it as I'm
15 sitting here; I don't know that I've reached a final
16 conclusion on it, but go ahead.

17 MR. KEACH: Well, I think that that's certainly
18 something that can be incorporated into a proposed order,
19 language to that question.

20 THE COURT: Exactly.

21 MR. KEACH: The Court reserves, you know...

22 THE COURT: Yeah.

23 MR. KEACH: -- craft something. And
24 Mr. Greagan, I can reach out to him on that. What was the
25 amount that the Court approved in out of pocket litigation

1 expenses?

2 THE COURT: Well, I intend to approve -- I mean
3 I got to be frank with you -- and I'm not throwing stones --
4 your math and numbers were all over the place. We had a
5 nightmare with that. But I know what I intend and that's to
6 compensate for the out of pocket cost expenses.

7 MR. KEACH: Okay. I think it's --

8 THE COURT: I can tell you what number I had on
9 that.

10 MR. KEACH: No, that's fine, your Honor.

11 THE COURT: I had 9,001.50 in cost and fees.

12 MR. KEACH: There's an additional thousand
13 dollars in there, but we can work that out with Mr. Greagan.

14 THE COURT: And I would be happy to incorporate
15 in the order whatever the parties -- in other words, I intend
16 to award the costs and fees. And then I understood the
17 administrative fees were 107,000. Those are the numbers I'm
18 working with.

19 MR. KEACH: Right.

20 THE COURT: But if the parties tell me that the
21 administrative costs and fees are 10,001.50, that's what I
22 intend.

23 MR. KEACH: Okay.

24 MR. GREAGAN: Your Honor, may I be heard
25 briefly on this score?

1 THE COURT: Please, please.

2 MR. GREAGAN: Just a point of housekeeping.

3 They've retained an administrator for the purposes of doing
4 the ministerial acts. I would expect that that administrator
5 would handle the trying to track down; that that's not being
6 billed at \$250 an hour, that's being billed at this
7 administrator's ministerial acts. And I assume, I assume the
8 Court is going to be the gatekeeper regarding those things.

9 THE COURT: Precisely.

10 MR. GREAGAN: All right. I'm trying to define,
11 I perceive here that I'm going to pay into an escrow account a
12 sum of money the 2.5, less what's already been paid and
13 perhaps wash my hands of this, close my file, stop billing my
14 client for these -- for -- and, and since, pursuant to the
15 agreement, I'm not opposing the appeal, at least I don't think
16 I am, and so, therefore, my day may -- I would like to try to
17 craft this so I can walk away from this thing.

18 THE COURT: I have no idea what the appellate
19 rule is in that regard. You're telling me you won't defend my
20 decision?

21 MR. GREAGAN: Well, well, your Honor...

22 THE COURT: I'm teasing you Mr. Greagan.

23 MR. GREAGAN: That's okay.

24 THE COURT: I'm teasing you.

25 MR. GREAGAN: I don't know whether that's

1 enforceable or not, or what my obligations are or, more
2 importantly, whether my client wants to pay for it.

3 THE COURT: I understand it entirely. And I'm
4 chuckling about it because you got a point. But you and I
5 know that's subject to the rules and regulations of the Second
6 Circuit, their requirements about appellate practice is
7 concerned, and I don't know what the answer is.

8 Maybe I got to hire a lawyer to defend my
9 decision, I don't know. (laughter.)

10 MR. GREAGAN: As I said, my client will no
11 longer have to walk in this fight.

12 THE COURT: I understand. And I appreciate
13 your input. Because what I'm seeking is clarifications of the
14 contingencies that can arise here, so when you submit the
15 proposed order to me, you know what it is that I'm trying to
16 effectuate here. So the answer is, I want to effectuate
17 whatever the real expenses are, and I want to effectuate
18 whatever the administrative costs are. And I have no problem
19 with reserving in a trust fund not for immediate distribution
20 to the class settlement proposed costs, fees and
21 administrative expenses to be incurred in effectuating the
22 orders. The only thing I'm reserving on is whether or not I
23 would include in that sum of money to be paid into the escrow
24 account attorneys' fees for pursuing the appeal. I got to
25 think about that.

1 MR. MENKEN: Well, Judge, one other thing to
2 clarify. And I understand the Court's quagmire on that issue.
3 And then the Court candidly realized that we sort of wrapped
4 up the end game here with the expectation, if you will, that
5 we would receive a multiplier or the percentage of funds
6 method. Having been rejected on that application, I'm hearing
7 from the Court that in addition to the administration -- and
8 I'm sure your Honor will tell me if I'm wrong, but in addition
9 to the administration, any hours, forexample, that were spent
10 preparing for today or working up until today that were not
11 included in the attorney fee application, I would expect we
12 could put in an application for. And I also --

13 THE COURT: And I would consider whether I
14 thought the time and purposes --

15 MR. MENKEN: Was reasonable.

16 THE COURT: -- was reasonable. And if so, I
17 would compensate you for that.

18 MR. MENKEN: Okay. Because I just want the
19 Court to know, okay, and Mr. Laduca and Mr. Keach can speak
20 for themselves, but any suggestion by Mr. Greagan, okay, that
21 the folks on this side are ambulance chasers or bloodsuckers
22 or anything like that, that's not right. I mean that's not
23 right. There was a constitutional violation here from '01 to
24 '03. I mean there was and Mr. Greagan's chief witnesses
25 conceded that. There were documents to support that. So if,

1 in fact, Mr. Keach was --

2 THE COURT: Save it. That part of your record
3 is fine. You don't need to bore me with that.

4 MR. MENKEN: Okey doke. I am aware of the
5 difficulty there has been as this case has progressed. I
6 don't condone it. I don't support it. I subscribe to the
7 rules of civility. Mr. Keach knows that well. And I will
8 enforce them.

9 THE COURT: No need to raise those issues.
10 You've made your record to respond.

11 MR. MENKEN: Okay.

12 THE COURT: And the record is imminently clear.
13 What I'm trying to be crystal clear on is what I would
14 authorize and what I would not in light of the intentions of
15 my ruling which were not anticipated by the parties. So put
16 it in a proposed order and I'll take a look at it.

17 MR. MENKEN: Okay.

18 MR. GREAGAN: One more thought, your Honor.

19 THE COURT: Go ahead.

20 MR. GREAGAN: My thought here is, given the
21 nature of this particular class and their -- and I don't mean
22 in a pejorative way -- the relative interest in this, I don't
23 see any reason to be cutting two checks to these folks as
24 opposed to -- because how much, how much do they get the first
25 time, how much is reserved, how long is this going to take?

1 Since it's all coming out of that common fund, I think it
2 would be administratively easier, and I throw it out for
3 whatever purpose, that the whole thing be paid into the fund.
4 And then once there is a final resolution --

5 MR. MENKEN: Agreed.

6 MR. GREAGAN: Oh, all right. Because you were
7 talking about -- well, this is --

8 MR. KEACH: No, no, the whole -- your Honor,
9 how the settlement agreement works, Mr. Greagan has to pay
10 2.5 million into the fund. And, obviously, the Court has
11 reduced our fee substantially and --

12 THE COURT: Don't use lodestar.

13 MR. KEACH: I'm sorry.

14 THE COURT: That's now a no-no.

15 MR. KEACH: I'm sorry. Your Honor has reduced
16 our request for attorneys' fees --

17 THE COURT: Teasing you. Go ahead.

18 MR. KEACH: -- quite substantially. And we,
19 obviously, had that happen to us once before, which,
20 obviously, led to the change of structure in settlements, and
21 in this case is obviously to the benefit of our class members
22 substantially, given the initial estimates of the class size,
23 but the amount of attorneys' fees that the Court has not
24 awarded, the entire thing goes into an escrow account under
25 the express terms of the settlement agreement, so we are going

1 to send out two checks to these folks.

2 THE COURT: Okay.

3 MR. KEACH: Going to send them a check for 1700
4 and change -- or excuse me -- 1900 and change. That amount is
5 going to stay in escrow gathering interest. If the Second
6 Circuit affirms your Honor's ruling, then there will be a
7 second distribution, and the people will be made aware of that
8 as part of the notice they get. Yeah, Mr. Greagan has to pay
9 in the 2.5 million; he has no obligation after today.

10 MR. MENKEN: We're clear.

11 THE COURT: Perhaps. That depends on whatever
12 rule the Circuit has.

13 All right. Anything further I can do for you?

14 MR. KEACH: Not from the plaintiff, your Honor.

15 MR. GREAGAN: Are we still on the record?

16 THE COURT: We are unless you want to go off.

17 MR. GREAGAN: No, that's okay, as long as we
18 are still on, what will end up being the appellate record, for
19 a comparison, your ruling today is three times what I've
20 charged as of July 31, '07.

21 THE COURT: Anything further?

22 MR. KEACH: Not from the plaintiff, your Honor.

23 THE COURT: Thank you.

24 (Court adjourned at 4:00 PM.)

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C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, Official Court Reporter
in and for the United States District Court, Northern District
of New York, do hereby certify that I attended at the time and
place set forth in the heading hereof; that I did make a
stenographic record of the proceedings held in this matter and
caused the same to be transcribed; that the foregoing is a
true and correct transcript of the same and whole thereof.

BONNIE J. BUCKLEY, RPR
USDC Court Reporter - NDNY

DATED: SEPTEMBER 14, 2007